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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE GUADALUPE AGUAYO, Defendant and Appellant.	2d Crim. No. B284747 (Super. Ct. Nos. YA093259, YA090209) (Los Angeles County)

Jose Guadalupe Aguayo appeals his conviction, by jury, of: making a criminal threat (count 1, Pen. Code, § 422, subd. (a)),[1] false imprisonment by violence (count 2, § 236), and willful infliction of corporal injury on a person with whom he had a dating relationship. (Count 3, § 273.5, subd. (a).) The jury further found that appellant personally used a deadly and dangerous weapon, a knife, in committing the false imprisonment and criminal threat offenses. (§ 12022, subd. (b)(1).) Appellant

[1] All further statutory references are to the Penal Code.

admitted having suffered a prior serious felony conviction. (§ 667, subd. (a)(1).) He was also found to have violated his probation in a prior matter in which he dissuaded a witness from reporting a crime. (§ 136.1, subd. (b)(1).)

On case no. YA093259, the trial court sentenced appellant to a term in state prison of 16 years. It selected count 3, the corporal injury offense (§ 273.5, subd. (a)), as the principal term and imposed a base term of four years, doubled to eight years due to appellant's prior strike conviction. The trial court also imposed a five-year enhancement term for the prior serious felony conviction. (§ 667, subd. (a)(1).) Next, the trial court imposed a term of 8 months, doubled to 16 months, for count 1, the criminal threats offense (§ 422, subd. (a)), plus one year for the deadly weapon enhancement. (§ 12022, subd. (b)(1).) It imposed a concurrent term of three years for count 2, the false imprisonment offense (§ 236), plus one year for the deadly weapon enhancement. On case no. YA090209, the trial court imposed a consecutive term of eight months for the probation violation.

Appellant contends: the trial court prejudicially erred when it failed to instruct the jury that it had to reach a unanimous verdict as to the specific criminal threat made by appellant; the terms imposed for false imprisonment and criminal threats should be stayed pursuant to section 654; the judgment should be modified to award additional custody credit against the term imposed for the probation violation; the deadly weapon enhancement attached to appellant's criminal threats conviction should be reduced; and the matter should be remanded for resentencing under Senate Bill No. 1393. (Sen. Bill No. 1393 (2017-2018 Reg. Sess).)

We will direct the trial court to award 345 days additional custody credit on case no. YA090209, to stay the term imposed on count 2 pursuant to section 654, and to reduce the term imposed on the deadly weapon enhancement to four months. We remand the matter to permit the trial court to determine whether the prior serious felony conviction enhancement should be stricken in the interest of justice. In all other respects, we affirm.

Facts

M.R. had been in a dating relationship with appellant for about four months when the incidents at issue here occurred. On the evening of October 29, 2015, she was with appellant at his home in Lennox. The two took some methamphetamine and appellant began to accuse M.R. of cheating on him. Appellant wanted M.R.'s cell phone which she refused to give him. He became angry and punched her several times in the face and on the side of her head, using both his fists. Appellant hit M.R. on other parts of her body as well, leaving bruises on her arms, legs, shoulders, and back. After awhile, M.R. suggested they smoke some marijuana, so appellant would calm down and they could sleep.

Appellant and M.R. left the house, walking to a nearby location to buy marijuana. During the walk, appellant told M.R. not to "'make a scene'" or "'do anything dumb,'" "'or else.'" Appellant bought more methamphetamine instead of marijuana. On the walk back to appellant's house, appellant told M.R. he was going to kill her and chop her into pieces. He also told M.R. to "'act normal and walk with me, or else.'" She saw that he had a knife in his back pocket and was scared.

When they got back to appellant's home, they smoked the methamphetamine. Appellant continued to threaten M.R., telling her that he hated her and swinging the knife at her in a stabbing motion. Appellant told M.R. he would kill her if she ever left him. He also prevented M.R. from leaving the residence by guarding the door and brandishing the knife. When M.R. complained that she needed to urinate, appellant would not let her use the bathroom. Instead, he instructed her to use a small "kiddie pool" in their turtle enclosure. Eventually, appellant fell asleep. M.R. left the house and called 9-1-1.

Sheriff's deputies arrested appellant at his home later that morning. They observed scratches on his chest and arms, as M.R. had described. They also observed the turtle enclosure. M.R. recovered the knife appellant had been brandishing the previous night.

While he was in custody, appellant made phone calls to M.R., tapes of which were played for the jury. On several occasions, M.R. complained to appellant about the abuse she suffered at his hands. He asked for her forgiveness and also asked her talk to the district attorney about dropping the charges against him.

Appellant's ex-wife testified that he hit or threatened her on more than 20 occasions during the 12 years they were married. He was always under the influence of alcohol when he became abusive. Appellant's ex-wife believed her safety was threatened because she was testifying against him.

Discussion

Unanimity Instruction

Appellant contends the trial court erred when it failed to instruct the jury, sua sponte, that it was required to

agree unanimously on the specific statement constituting the criminal threat. There was no error.

"In a criminal case, a jury verdict must be unanimous." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Ibid.*) "When the prosecutor does not make an election, the trial court has a sua sponte duty to instruct the jury on unanimity." (*People v. Mayer* (2003) 108 Cal.App.4th 403, 418.)

A unanimity instruction is not, however, required where the evidence "shows one criminal act or multiple acts in a continuous course of conduct." (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292 (*Jantz*).) The continuous course of conduct exception applies when "'the acts are so closely connected that they form part of one and the same transaction, and thus one offense[,] . . . '" or when the statute that defines the crime "'contemplates a continuous course of conduct or a series of acts over a period of time. [Citation.]' [Citation.]" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 299.) The exception also applies "when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100 (*Stankewitz*).)

Here, appellant held M.R. hostage overnight from October 29 until the morning of October 30. During that time he beat her, slashed at her with a knife, guarded the door to keep her from leaving the house and prevented her from using the

toilet. Throughout the ordeal, appellant threatened to kill M.R. The prosecution identified three specific statements made by appellant that constituted criminal threats: (1) while the couple was walking home from buying methamphetamine, appellant told M.R. to "'act normal and walk with [appellant] or else'"; (2) during the same walk, appellant told M.R. he was going to kill her and "chop [her] up in pieces"; and (3) after they got home and smoked the methamphetamine, appellant told M.R. he would kill her if she ever left him.

The statements form a continuous course of conduct because they occurred within a few hours of one another, while appellant continued to restrict M.R.'s freedom of movement. (*Jantz*, *supra*, 137 Cal.App.4th at p. 1292.) In addition, appellant offered the same defense to each statement: M.R. was an unreliable witness because she was under the influence of drugs and appellant's statements did not constitute criminal threats because he was also under the influence. (*Stankewitz*, *supra*, 51 Cal.3d at p. 100.) A unanimity instruction was not required.

People v. Salvato (1991) 234 Cal.App.3d 872 is not to the contrary. There, the court considered whether a unanimity instruction was required where the defendant made a series of criminal threats against his victim over a period of 16 months and through a variety of media. Factually, the threats did not comprise a continuous course of conduct because they were separated in time and different in kind. The *Salvato* court considered whether the criminal threat statute itself defined the offense as one involving a continuous course of conduct. (*Id.* at p. 882.) It determined that the statute refers to a single act taken at a particular moment in time. (*Id.* at p. 883.) The *Salvato* court concluded the trial court should have required the

prosecution to elect a particular threat on which it relied to prove the offense. (*Id.* at p. 884)

Salvato is factually distinguishable from the present case because here the threats occurred over a single night and were made while appellant was holding M.R. hostage. Appellant's threats comprised a continuous course of conduct. A unanimity instruction was not required.

Custody Credits

Appellant contends he is entitled to an additional 345 days of presentence custody credit applied to the eight-month subordinate term imposed for his probation violation in case no. YA090209. Respondent correctly concedes that appellant is entitled to the credits.

Section 2900.5, subdivision (a) provides, "In all felony and misdemeanor convictions, either by plea or by verdict . . . all days of custody of the defendant, including days served as a condition of probation . . . shall be credited upon his or her term of imprisonment . . . ." (§ 2900.5, subd. (a).) Custody credit "is to be applied for time served on a subordinate term resulting from a probation violation." (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1414, citing *People v. Riolo* (1983) 33 Cal.3d 223, 228-229.)

In June 2014, appellant was placed on formal probation after pleading guilty to dissuading a witness in case no. YA090209. In August 2015, the trial court revoked appellant's probation. His probation was still revoked when he was arrested on October 30, 2015 for his offenses against M.R. Between June 2014 and October 30, 2015, appellant accrued a total of 345 days

of custody credit in case no. YA090209.[2] Appellant remained in custody until he was sentenced in both cases on August 24, 2017. The trial court awarded appellant 1,330 days of presentence custody credit for time in custody between October 30, 2015 and August 24, 2017. But it did not account for the time appellant spent in custody before October 30, 2015 on case no. YA090209. He is entitled to an additional 345 days of custody credit as against the eight-month subordinate term which is deemed served.

Section 654

The trial court sentenced appellant to a term of eight years on count 3, injuring a person with whom he had a dating relationship (§ 273.5, subd. (a)), a consecutive term of 16 months on count 1, criminal threats (§ 422, subd. (a)), and a concurrent term of three years on count 2, false imprisonment. (§ 236.) Appellant contends the trial court erred when it failed to stay the terms imposed on counts 1 and 2 under section 654. He argues that the criminal threats charged in count 1 and the physical injury charged in count 3 were the means by which he falsely imprisoned M.R., as charged in count 2. Because all three offenses were part of an indivisible course of conduct, he contends the terms imposed on counts 1 and 2 should have been stayed.

Respondent correctly concedes the term imposed on count 2 should be stayed. The false imprisonment occurred close in time to the criminal threats, and appellant committed both offenses with the intent to prevent M.R. from leaving him. As respondent contends, however, the corporal injury alleged in

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[2] Appellant served 120 days in custody as a condition of probation. Over the next two years, he served an additional 225 days in custody for various probation violations.

count 3 occurred at a different time from the other felonies. Appellant also had different intents in physically injuring M.R.: to hurt her and to punish her for not giving him her cell phone.

Section 654 generally bars multiple punishments for a single physical act that violates more than one provision of law. (*People v. Jones* (2012) 54 Cal.4th 350, 358.) It also bars multiple punishments "for an indivisible course of conduct that violates more than one criminal statute." (*People v. Newman* (2015) 238 Cal.App.4th 103, 112, italics omitted.) "Whether a course of conduct is indivisible depends on the intent and objective of the actor." (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65.) If various offenses were incidental to, or were the means of accomplishing, a single criminal objective, the defendant harbored only a single intent and may be punished only once. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Criminal acts committed pursuant to independent objectives or intents can be punished separately. (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689 [section 654 inapplicable where defendant "harbored [multiple] intents"].) In addition, "'a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]' [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one . . . ." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

The trial court here correctly imposed separate punishments for making criminal threats (count 1) and causing injury to M.R. (count 3), because those offenses were separated in time and involved different criminal intents. Appellant beat M.R.

shortly after she arrived at his house and before the couple left to buy drugs. He began threatening to kill her during their walk back to the house after he made the drug purchase. Appellant beat M.R. to cause her pain and punish her for not giving him her cell phone. He threatened her to keep her from leaving. Because these offenses were separated in time and involved different intents, separate punishments were appropriate.

The concurrent sentence imposed on count 2, false imprisonment, should however have been stayed under section 654. M.R.'s testimony did not provide a perfectly consistent timeline of events. However, she described appellant beating her earlier in the evening and said that she first felt like a hostage later that night, after they returned from buying more drugs. M.R. also testified that appellant threatened to kill her around the same time as he physically prevented her from stepping out of the house and from using the bathroom. Appellant's threats were made to prevent M.R. from leaving him. He simultaneously physically restrained her from leaving. These two offenses were committed with the same intention and very close to one another in time. We conclude the criminal threats and false imprisonment constituted an indivisible course of conduct. The trial court erred when it failed to stay the term imposed on count 2 under section 654.

Deadly Weapon Enhancement

At sentencing, the trial court selected count 3 as the principal term and sentenced appellant to the base term of four years, doubled to eight years under the Three Strikes law. With regard to count 1, the trial court imposed a consecutive subordinate term of eight months (one-third the middle term of 24 months, §§ 422, 1170, subd. (h)(1)), doubled to 16 months

because of appellant's prior conviction. The trial court also imposed a one-year deadly weapon enhancement based on appellant's use of a knife to falsely imprison M.R. (§ 12022, subd. (b)(1).)

Appellant contends the one-year deadly weapon enhancement must be reduced to one-third the full term because it is attached to a subordinate consecutive term. Respondent concedes the error and we agree. Each subordinate term "shall consist of one-third of the middle term of imprisonment prescribed" for that offense "and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." (§ 1170.1, subd. (a); see also *People v. Hill* (2004) 119 Cal.App.4th 85, 91.) The deadly weapon enhancement attached to count 1 should have been reduced to four months.

Senate Bill No. 1393

Appellant's 16-year sentence includes a five-year enhancement term for his prior serious felony conviction. (§ 667, subd. (a)(1).) At the time of his sentencing, the trial court lacked discretion to strike that enhancement in the interest of justice. (Former § 1385, subd. (b).) Effective January 1, 2019, Senate Bill No. 1393 removed that prohibition. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272.) The new legislation applies to appellant because his case is not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 747; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

Appellant contends the matter should be remanded to permit the trial court to exercise its discretion to strike the prior serious felony enhancement. Respondent contends remand would be futile because the trial court's statements at sentencing suggest that it would not have stricken the enhancement. (See, e.g., *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand

for resentencing not required where record shows trial court "clearly indicated . . . that it would not in any event have stricken a firearm enhancement"].)

At sentencing, the trial court offered a harsh assessment of appellant and his crimes: "[L]et me say that I've heard a lot of trials over the years and a lot of domestic violence cases over the years, that this one was probably one of the more disturbing set of facts that I've heard in quite some time. [¶] [¶] The degradation, the humiliation, the intimidation that [appellant] put [M.R.] through that night defies understanding. In order to treat another human being, one, in an act of violence, but then to also in the course of a violent evening over a course of 12 hours subject the person to urinating in a turtle [pen] defies understanding."

Although the trial court was extremely critical of appellant, it remains the case that, at the time of sentencing, the trial court lacked the power to strike the prior serious felony enhancement. Appellant is "'entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] . . . [Citation.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.) The trial court could not exercise informed discretion here because its power to strike the enhancement had not yet been conferred by the Legislature. We will remand so that the trial court can exercise its discretion in this regard.

Disposition

The judgment is modified to grant appellant credit for an additional 345 days of presentence custody against the term imposed in case no. YA090209. The trial court is directed to

stay execution of the sentence imposed on count 2, false imprisonment (§ 236), pursuant to section 654. The trial court is further directed to reduce the term imposed for the deadly weapon enhancement (§ 12022, subd. (b)(1)), on count 1 to four months. Finally, the matter is remanded to the trial court for the purpose of allowing it to determine whether the five-year prior serious felony conviction enhancement (§ 667, subd. (a)(1)), should be stricken in the interest of justice. (§ 1385.) Appellant has the right to be personally present. The trial court shall amend the abstract of judgment consistent with these directions and shall send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Alan B. Honeycutt, Judge

Superior Court County of Los Angeles

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